Supreme Court, U.S.
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Supreme Court of the United States
OCTOBER TERM, 1993

ROBERT BURACKER, SHERIFF,
as Successor in Interest to
ROY E. THOMPSON, Administrator
to the Estate of Charles W.
Nickelson, Jr., deceased,

Petitioner,

v.

GLENN M. WILT and
SANDRA B. WILT,

Respondent.

Petition For Writ of Certiorari To The Supreme Court Of Appeals of West Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution require that a litigant subjected to an award of punitive damages be granted post-trial review?

II. If so, what constitutes meaningful post-trial review of such an award?

PARTIES TO THE PROCEEDINGS BELOW

Robert Buracker, Sheriff, as Successor in Interest to Roy E. Thompson, Administrator to the Estate of Charles W. Nickelson, Jr., deceased (Charles Town, West Virginia).

Glenn M. Wilt, (Charles Town, West Virginia).

Sandra B. Wilt, (Charles Town, West Virginia).

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DECISION PRESENTED FOR REVIEW AND JURISDICTIONAL STATEMENT

The decision presented for review is *Robert Buracker, Sheriff, as Successor in Interest to Roy E. Thompson, Administrator to the Estate of Charles W. Nickelson, Jr., deceased, v. Glenn M. Wilt and Sandra B. Wilt*, (No. 21708, W.Va., December 13, 1993). This decision has not yet been assigned a volume and page citation in either the official West Virginia reports or the South Eastern Reporter 2d. Its Westlaw reference is 1993 WL517042. A copy of the decision appears at Appendix, Tab "A."

This Petition arises from a November 16, 1992, Order of the Circuit Court of Jefferson County, West Virginia (hereinafter "Circuit Court") and a subsequent Opinion and Order of the Supreme Court of Appeals of West Virginia (hereinafter "West Virginia Supreme Court") entered December 13, 1993, affirming in part, reversing in part and remanding this matter to the Circuit Court.[1] Thereafter, a Petition for Rehearing was timely filed on the issue of punitive damages addressed therein. (Appendix, Tab "B"). Said Petition was denied by the West Virginia Supreme Court on January 26, 1994. (Appendix, Tab "C"). In refusing to reverse or remand the punitive damages award, this Petitioner contends that the Circuit Court and the West Virginia Supreme Court violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Accordingly, jurisdiction is properly vested in this Court pursuant to 28 U.S.C. §1257(a) (1988).

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[1]The West Virginia Supreme Court remanded the case to permit the plaintiff to either elect a remittitur of Two Hundred Fifty Thousand Dollars ($250,000.00), or in the alternative, a new trial from an award of hedonic damages found to be impermissible in West Virginia.

PRINCIPAL CONSTITUTIONAL PROVISIONS AND STATUTES

> [N]or shall any State deprive any person of life, liberty or property, without due process of law. . .

U.S. Const., Amend. XIV, § 1.

STATEMENT OF THE CASE

This litigation arises from a fatal collision on U.S. Route 340 in Jefferson County, West Virginia which occurred May 3, 1986. As a result of that accident, Charles W. Nickelson, Jr. and his son were killed and a guest passenger was injured. The second vehicle involved was occupied by Glenn M. and Sandra B. Wilt, husband and wife, both of whom were injured. As a result thereof, a civil action was filed April 29, 1988, in the Circuit Court of Jefferson County, West Virginia. The Complaint demanded, *inter alia,* punitive damages against the Estate of Charles W. Nickelson, Jr., deceased. The Circuit Court, the Honorable Ronald E. Wilson, Visiting Judge presiding, tried this action before a six-person petit jury which returned a verdict in favor of the Respondents in the amount of One Million, Five Hundred Thirty Three Thousand, Three Hundred Sixty One Dollars and Thirty Cents ($1,533,361.30). The verdict included an award of punitive damages in the amount of One Million Dollars ($1,000,000.00), apportioned Five Hundred Thousand Dollars ($500,000.00) to each Respondent.

Thereafter, the Petitioner filed Motions for post-trial relief pursuant to Rules 50, 59 and 60 of the West Virginia Rules of Civil Procedure for entry of an Order of Judgment Notwithstanding the Verdict, Alternatively for a New Trial or to Alter and Amend Verdict, and a Remittitur alleging that the verdict was based upon improper elements of damages. (Appendix, Tab "D"). The Circuit Court conducted hearings on the post-trial Motions and denied them on November 16, 1992. During the hearing on said Motions, however, the Circuit Court provided no reasoning for its denial of the post-trial Motions with respect to punitive damages, nor did its Order contain any findings of fact or conclusions of law as to

the punitive damages aspect of the verdict. Rather, the Circuit Court's Order stated:

> **[T]he Defendant's Amended Motion for Post-Trial Relief and Motion for Remittitur are without merit and should be denied.**

(Appendix, Tab "E").

The Petitioner thereafter filed a Petition for Appeal to the West Virginia Supreme Court on March 19, 1993, based upon denial of the Motions for post-trial relief and other erroneous rulings of the trial Court.[2] Thereafter, the West Virginia Supreme Court accepted briefs and heard oral argument on the matter on September 28, 1993. At that time, the West Virginia Supreme Court asked only one question during oral argument concerning the punitive damages aspect of this matter despite the fact that it was fully briefed by both parties prior to argument and submission. On December 13, 1993, the West Virginia Supreme Court handed down its decision (Appendix, Tab "A"), which affirmed the punitive damages aspect of this matter. The constitutional question raised herein was addressed by the West Virginia Supreme Court in one paragraph in which the Court held:

> **The Defendant also contends that the award of punitive damages violated constitutional due process guarantees because the trial Court failed to adequately instruct the jury so as to protect the Defendant from a punitive award "grossly disproportionate to the severity of the offense or to accomplish**

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[2]Said Petition for Appeal was accepted by the West Virginia Supreme Court May 11, 1993.

> **society's goals of punishment and deterrence[.]" Our general rule on the adequacy of jury instructions concerning punitive damages was stated in syl. pt. 13 of TXO Production Corp. v. Alliance Resources Corp., 187 W.Va. 457 419 S.E.2d 870 (1992), aff'd, 509 U.S. ___, 113 S.Ct. 2711, 125 L. Ed. 2d 366 (1993). We find that the jury instruction was adequate under TXO and, under this standard, the amount of punitive damages awarded was not improper even if the hedonic damage evidence had been excluded.**

Thereafter, the Petitioner timely filed a Petition for Rehearing concerning the punitive damages aspect of this case on January 11, 1994. (Appendix, Tab "B"). Said Petition for Rehearing was denied by the West Virginia Supreme Court January 26, 1994. (Appendix, Tab "C"). The Petitioner asserts that the Circuit Court, the court of first instance, and the West Virginia Supreme Court, the only appellate court in West Virginia, were both required to consider the federal question of whether the award of punitive damages comported with due process of law and both were required to provide a meaningful post-trial review of the punitive damages award in order to adequately safeguard the due process rights of this Petitioner. Both Courts denied any such post-trial review to this Petitioner.

The post-trial Motions (Appendix, Tab "D"), present the due process question which was overlooked by the Court of first instance. The Brief of the Appellant before the West Virginia Supreme Court, likewise raised the due process question at the appellate level. It is upon the denial of the Circuit Court and the West Virginia Supreme Court to conduct

any meaningful post-trial review of the punitive damages award upon which the instant appeal is based. Accordingly, this Petitioner seeks *certiorari*, only upon the federal constitutional question raised and decided below and as presented herein.

Therefore, this Petitioner respectfully requests that the decision of the West Virginia Supreme Court be reversed and the matter be remanded for further proceedings consistent with the due process guarantee of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

This Court has taken extensive steps to protect the rights of litigants with respect to punitive damages. In this decade alone, this Court has twice considered the effect of the Due Process Clause on the award of punitive damages. *Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, (1991); TXO Production Corp. v. Alliance Resources Corp., ___ U.S. ___, 113 S.Ct. 2711, (1993).*

In *Haslip*, this Court reviewed post-trial procedures of applicable Alabama precedent in scrutinizing a jury verdict for excessiveness of the damages from *Hammond v. City of Gadsden, 493 So.2d 1374 (Ala. 1986)*, and upheld the post-trial requirements as set forth in *Hammond*. The *Haslip* Court held that the common-law methodology of imposing punitive damages must satisfy at least the minimum requirements of due process. The Court expressly recognized that judicial review of the size of punitive damages is an essential component of the common-law method. The jury's determination is then reviewed by trial and Appellate Courts to insure that it is reasonable. *Id. at 15.* (emphasis added).

The *Haslip* Court did not mandate a single standard, but rather imposed a three-tiered system of review to insure that punitive damages do not violate a litigant's due process rights. The first stage is jury instruction; the second stage is the trial Court's review of the jury award for excessiveness; and, the third stage is Appellate Court review. These factors were specifically endorsed by the *Haslip* Court and were later enlarged upon by both the West Virginia Supreme Court and this Court in approving the West Virginia Supreme Court's standard of reviewing punitive damages awards in *TXO*.

In *Hammond*, the Supreme Court of Alabama was

called upon to review the trial Court's order of a new trial unless the plaintiff remitted for a portion of the verdict in a multiple-count action. In so doing, the Supreme Court of Alabama held that it was not only appropriate, but indeed the duty, of the highest Appellate Court of that state to require trial Courts to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages. *Id. at 1379.* Accordingly, the *Hammond* Court set forth factors which are appropriate for trial Court consideration:

1. The culpability of the defendant's conduct;
2. The desirability of discouraging others from similar conduct; and,
3. The impact upon the parties, as well as other factors such as the impact on innocent third-parties.

Id. at 1379.

In setting out the foregoing factors, the *Hammond* Court held:

> Only by requiring that a record be made can this Court adequately discharge its role of Appellate review of trial Court action in either granting or refusing to grant a new trial where remittitur is granted or denied. . . .
>
> We simply now require the trial Courts to state for the record the factors considered in either granting or denying a motion for new trial based upon the alleged excessiveness or inadequacy of a jury verdict. We know of no other way by which this Court can discharge

fairly its role of review.

Id. at 1379.

The *Haslip* Court further held that trial Court review of a punitive damages award is a necessary element due to the fact that trial Courts often have more information than is proper to be presented to a jury and therefore, can take into consideration other relevant factors in determining whether the award is justified. Furthermore, all courts recognize that juries often return awards based on matters other than evidence presented and it is therefore incumbent upon a trial Court to then restrain those verdicts so that they serve only their dictated purpose.

Following *Haslip*, the West Virginia Supreme Court, in *Garnes v. Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E.2d 897 (1991)*, stated its concern for potentially devastating punitive damages verdicts and adopted the *Haslip* factors. The *Garnes* Court also set forth its own factors for a jury to consider before awarding punitive damages.[3] The West Virginia Supreme Court expanded upon the Alabama standard by setting forth a mandatory post-trial review by the trial Court and specifically required trial Courts in reviewing an award of punitive damages to, at a minimum, consider the factors given to the jury as well as additional factors. The *Garnes* Court held: "Foremost is our concern that there be: (1) a reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial court using well established principles; and, (3) a meaningful and adequate appellate

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[3]The West Virginia scheme of review of punitive damages was later confirmed by this Court as in compliance with due process standards. *TXO Production Corp. v. Alliance Resources Corp., ___ U.S. ____, 113 S.Ct. 2711, (1993).*

review." *Id., 186 W.Va. at ___, 413 S.E.2d at 908.*

Furthermore, the *Garnes* Court held that when reviewing the punitive damages award, a West Virginia trial Court "should thoroughly set out the reasons for changing (or not changing) the award." *Id., 186 W.Va. at ___, 413 S.E.2d at 910.* In reviewing awards, West Virginia trial courts have been instructed to consider:

1. The cost of the litigation;
2. Any criminal sanctions imposed on the defendant for his conduct;
3. Any other civil actions against the same defendant based on the same conduct; and,
4. The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed.

Id., 186 W.Va. at ___, 413 S.E.2d at 900, Syl. Pt. 4 (emphasis added).

Following in its concern that there also be a meaningful and adequate appellate review, the *Garnes* Court specifically provided the procedures under which litigants may petition for appeal to the West Virginia Supreme Court and delineated what information must be presented in the Petition for Appeal and how the Justices of the West Virginia Supreme Court would consider each factor. *Id., 186 W.Va. at ___, 413 S.E.2d at 910.*

The *Garnes* Opinion was handed down just days before

the trial of the instant civil action and counsel for the Petitioner provided a copy of the Opinion to the trial Court with a verbatim jury instruction as per the *Haslip/Garnes* standard. The trial Court, however, refused to adhere completely to the *Haslip/Garnes* requirements and gave a substantially similar instruction as proffered by counsel for the Respondents. (Appendix, Tab "H"). Furthermore, the trial Court instructed the jury to consider additional factors beyond those enunciated in *Garnes*.

Thereafter, the Petitioner filed Motions for post-trial relief, including a Motion for New Trial and a Motion for Remittitur on improper elements of damages, including the punitive damages award. It was incumbent upon the trial Court at that juncture to conduct a meaningful post-trial review as required by the West Virginia Supreme Court and by this Court as per *Garnes* and *Haslip*, respectively.

While the post-trial Motions were under consideration by the Circuit Court, the West Virginia Supreme Court issued a subsequent opinion on punitive damages. In *TXO Production Corp. v. Alliance Resources Corp., 187 W.Va. 457, 419 S.E.2d 870 (1992)*, the West Virginia Supreme Court again set out the requirements of jury instruction and post-trial review of punitive damages awards. First, the *TXO* Court required the *Garnes* factors to be provided to the jury in instructions. Thereafter, the West Virginia Supreme Court reiterated the necessity of post-trial review at both the trial and appellate levels and mandated that petitions for appeal address every *Garnes* factor.

The *TXO* award was further reviewed by this Court in *TXO Production Corp. v. Alliance Resources Corp., ___ U.S. ____, 113 S.Ct. 2711, (1993).* In upholding the award, a plurality of this Court held that the West Virginia post-trial

review scheme adequately protects due process rights of litigants. In so doing, this Court implicitly adopted the *Garnes* standards as at least the minimum due process safeguards granted to West Virginia litigants. Justice Stevens, writing for the plurality, held that it is "always helpful for trial Judges to explain the basis for their rulings as thoroughly as is consistent with the efficient despatch of their duties," and found that the unanimous opinion of the West Virginia Supreme Court had given "careful attention" to the relevant precedents. *Id.,___ U.S. at ___, 113 S.Ct. at 2724.* This approved methodology, however, was not applied to the case at bar.

In the instant civil action, none of the proper steps were applied and the due process rights of the Estate of Charles W. Nickelson, Jr., deceased, have consistently been violated. The due process rights of this Petitioner were ignored by the Circuit Court when it read improper instructions to the jury. This pattern continued when the trial Court did not conduct post-trial review but rather summarily denied all Motions with no reasoning provided therefor.

The trial Court consistently denied the appellant a meaningful post-trial review in direct contravention of *Haslip* and *Garnes*, as it was the *Garnes* Court that required West Virginia trial Courts to thoroughly set out their reasons for changing or not changing a punitive damages award. *Id., 186 W.Va. at ___, 413 S.E.2d at 910.* In the instant civil action, the trial Court entertained argument of counsel and after a five month delay, issued a *pro forma* Order which denied all post-trial Motions with no legal analysis nor any reasoning for its ruling. (Appendix, Tab "E").

The pattern of denying a meaningful post-trial review continued before the West Virginia Supreme Court. In its

December 13, 1993 Order and Opinion, the West Virginia Supreme Court conducted no review of the punitive damages award, but focused the bulk of its opinion on the accompanying issue of the admissibility of hedonic damages. The issue of the impropriety of the punitive damages award, the excessiveness of the award, and the failure of the Circuit Court to conduct a meaningful post-trial review, was overlooked by the Appellate Court in its Opinion. (Appendix, Tab "A"). Furthermore, the vast majority of oral argument on the case centered on hedonic damages and on only one occasion did Justice Richard Neely inquire of counsel for the Petitioner as to the amount of punitive damages that were awarded.

Following the West Virginia Supreme Court's refusal to comply with the Due Process Clause, a Petition for Rehearing was timely filed with the West Virginia Supreme Court (Appendix, Tab "B"). That Motion was also summarily denied without explanation on January 26, 1994. (Appendix, Tab "C").

This Court has specifically stressed the importance that trial Judges explain the basis for their rulings as thoroughly as possible. *TXO, ___ U.S. at ____, 113 S.Ct. at 2724*, and has consistently held that punitive damages hold a special station in our judicial system which requires meaningful post-trial review by at least the aforementioned three-tiered process to safeguard the due process rights of litigants whose property is at risk. This Court validated the West Virginia Supreme Court's requirements as to what must be conducted both at the trial and appellate levels in order to comply with the Due Process Clause. However, it is the very West Virginia Supreme Court, with no change in the composition of the bench, that has now gone contrary to its own dictates and seems to have paid only lip service to its requirements and to

this Court's mandates. In the instant civil action, the West Virginia Supreme Court has blatantly refused to adhere to this Court's requirements and in so doing has deprived the Estate of Charles W. Nickelson, Jr., deceased procedural and substantive due process by its failure to conduct a meaningful post-trial review.

What constitutes "meaningful" review has not been defined by this Court nor by the West Virginia Supreme Court, although it is clear that under any definition, the Estate of Charles W. Nickelson, Jr., deceased, has been denied a meaningful post-trial review since it has been denied any review.

The due process analysis articulated in *Haslip* requires a fact-intensive review. At the first stage, jury instructions, the trial Court is required to instruct the jury on the proper role of punitive damages. The Circuit Court had before it *Garnes,* the most recent pronouncement of the West Virginia Supreme Court as to what a jury must consider before awarding punitive damages. With that information in hand, however, the trial Court refused to grant an instruction completely in compliance with the guidance and instructions of *Haslip* and the West Virginia Supreme Court. (Appendix, Tab "H").

At the second stage of scrutiny mandated by the Due Process Clause, the trial Court should review the punitive damages award and record its reasons for upholding or altering it. In so doing, *Haslip* permits a trial Court to look to the aforementioned *Hammond* factors, or other general elements of reasonableness to determine whether a punitive damages award should be upheld. Again, the West Virginia Supreme Court provided in *Garnes* specific elements for a trial Court to consider. The Circuit Court failed to comply

with those dictates.

An attempt to define "meaningful" at this second stage of review was recently made by the Ninth Circuit Court of Appeals in *Morgan v. Woessner, 997 F.2d 1244 (9th Cir. 1993).* In analyzing the trial Court's review under the second stage of scrutiny, the *Morgan* Court cautioned that "the broader picture must not be lost." *Id. at 1257,* and it found that where a trial Court fails to record its reasons for finding a punitive damages award proper, the case should be remanded. It is without question that the trial Court did not conduct a meaningful post-trial review and did not record its reasons for finding the punitive damages award proper in the instant civil action. This alone mandates a remand for new trial on the issue of punitive damages, if any, to be awarded against the Estate of Charles W. Nickelson, Jr., deceased.

Apart from the trial Court review, *Haslip* and *Garnes* require a third stage of scrutiny -appellate post-trial review. It is at this stage, the *Morgan* Court held, that an Appellate Court undertakes two inquiries; first, it must determine and satisfy itself that the defendant was afforded the two prior stages of scrutiny. If either of the two prior stages is lacking, the *Morgan* Court held that the case should be reversed and remanded and therefore, the second inquiry by the Appellate Court will not occur until the first two have been accomplished. *Id., 499 U.S. at 1257.* The Appellate Court's second inquiry, only after satisfaction of the first, is a substantive review of the amount of the award. This appellate post-trial review, the *Haslip* Court held, is necessary to insure that the award "does not exceed an amount that will accomplish society's goal of punishment and deterrence." *Id., 499 U.S. at 17. (citations omitted).*

The plurality of justices in *TXO* found the post-verdict review of a West Virginia trial Judge to be adequate, but only after noting the Judge had provided a hearing on the post-verdict Motions and orally indicated his conclusion that the conduct at issue was enough to support the amount of punitive damages imposed. ___ *U.S. at* ___, *113 S.Ct. at 2724.* The trial Court's conduct was later upheld, although criticized by this Court's review of the award, when this Court found that the West Virginia Supreme Court of Appeals' Opinion "gave careful attention to the relevant precedents." *Id. at 2724.* In the instant civil action, however, the very West Virginia Supreme Court did not give the same "careful attention" to the relevant precedents, nor did it censure the Circuit Court for its failure to provide even the nominal post-verdict review that the trial Judge had afforded in *TXO.*

Justice O'Connor, in her *TXO* dissent, held: "Courts may now disregard the post-trial review required by due process at whim or will, so long as they do not deny its necessity openly or altogether." In the instant civil action, Justice O'Connor's prediction has materialized and both the Circuit Court and the West Virginia Supreme Court have denied the necessity of post-verdict reviews openly and altogether.

It was this very concern of checking the award that prompted the West Virginia Supreme Court to require a "meaningful judicial review of the size of punitive damages awards, so as to keep an award of such a potentially devastating element of damages in check." *Garnes, 186 W.Va. 656, 413 S.E.2d 897.* The Constitution requires nothing less.

This Court currently has before it an appeal seeking a

definition of "excessiveness" of punitive damages award in *Honda Motor Co., Ltd., et al. v. Oberg, (No. 93-644).* In its *Petition for Writ of Certiorari*, Honda argued the time to address the right to appellate review is "if ever there is a trial court ruling from which such review is denied." *Id. at 14, n.9.* That time has come. Here, the trial Court denied a litigant his constitutionally-mandated post-trial review. Moreover, the Appellate Court also denied the Estate of Charles W. Nickelson, Jr., deceased, a meaningful post-trial review. This Court has expressed its concern as to the excessiveness and constitutionality of punitive damages awards in granting *certiorari* in the *Honda* case and this Petitioner respectfully requests that this Petition likewise be granted and consolidated with *Honda* as these two cases present substantially similar situations.

Throughout the trial and appellate stages, the Circuit Court and the West Virginia Supreme Court have abandoned their duty to review the punitive damages award. This Court has repeatedly mandated a meaningful post-trial review and the West Virginia Supreme Court in applying that mandate has provided a detailed framework for trial Court and Appellate Court review. However, as evidenced in the instant civil action, the West Virginia Supreme Court has merely given lip-service to its requirements of trial Court review and when faced with a direct violation of its own requirements, refused to rectify the matter and further refused to comply with the requirement of its own stage of appellate review.

For the foregoing reasons, both the Circuit Court and the West Virginia Supreme Court have denied the due process rights of the Estate of Charles W. Nickelson, Jr., deceased, and the Petitioner, therefore, respectfully requests that this Petition for *Writ of Certiorari* be granted so as to define "meaningful" in the context of meaningful post-trial review of

punitive damages awards and to determine that the Estate of Charles W. Nickelson, Jr., deceased, has been denied that review as mandated by the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

This Court has held that the Due Process Clause of the Fourteenth Amendment requires trial Court and Appellate Court review of punitive damages awards and has adopted the West Virginia scheme of post-trial review as at least the minimum to assure compliance with due process mandates. Both the Circuit Court of Jefferson County, West Virginia and the West Virginia Supreme Court have violated the due process rights of the Estate of Charles W. Nickelson, Jr., deceased, in their repeated failures to review a One Million Dollar ($1,000,000.00) punitive damages award returned against the Estate. These failures have deprived the Estate of any and all constitutional safeguards.

Furthermore, without defining what constitutes a meaningful post-trial review litigants will continue to be denied due process of law. Therefore, the Petitioner respectfully requests that this Petition for *Writ of Certiorari* be granted so as to define "meaningful" in the context of meaningful post-trial review of punitive damages and to determine that the Estate of Charles W. Nickelson, Jr., deceased has been denied that review as mandated by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Respectfully Submitted,

ROBERT BURACKER, SHERIFF, AS SUCCESSOR IN INTEREST TO ROY E. THOMPSON, ADMINISTRATOR TO THE ESTATE OF CHARLES W. NICKELSON, JR., DECEASED BY COUNSEL

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